

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE CHIEF PROCUREMENT
OFFICER FOR CONSTRUCTION

IN THE MATTER OF: CONTROVERSY)
McENTIRE MEDICAL CLINIC &)
DINING HALL CONSTRUCTION)
STATE PROJECT NO. E24-9658-RC)
CAROLINA ELECTRICAL COMPANY)
OF COLUMBIA, INC.)

DECISION

POSTING DATE: January 11, 2002

vs.)

OFFICE OF THE ADJUTANT GENERAL)
_____)

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request dated June 13, 2000 from Carolina Electrical Company of Columbia (Carolina) under the provisions of §11-35-4230 of the South Carolina Consolidated Procurement Code (Code), for an administrative review on McENTIRE MEDICAL CLINIC & DINING HALL CONSTRUCTION (Project) for the Office of the Adjutant General (AGO). Pursuant to §11-35-4230(3) of the Code, the CPOC evaluated the issues for potential resolution by mutual agreement and determined that mediation was not likely to be successful. A hearing was held on December 13, 2001 on the issues in contention. At the conclusion of the hearing, the record was held open to permit the CPOC to review the procurement files in more detail. The hearing record was closed January 8, 2001.

NATURE OF THE CONTROVERSY

On September 29, 1998 AGO was authorized to execute a contract with Hood Construction Company, Inc. (Hood) as the General Contractor for the construction of the Project. Carolina was subsequently engaged by Hood to provide electrical construction work as a subcontractor to Hood. Included in this electrical construction work was the provision and installation of an interior communications system (ICS). Carolina employed the services of Simplex to provide the ICS. Carolina believes it has been required to provide an ICS in excess of the requirements of the bidding documents. Carolina requested additional compensation of nine thousand six hundred and ninety-eight dollars (\$9,698) as compensation for the additional cost for the as-installed system. The AGO disagrees with this position and has denied the claim.

FINDINGS OF FACT

1. The technical requirements for the ICS are defined in Section 16700 of the Technical Specifications, paragraph 2.2.4, as follows:

2.2.4 Intercom System: System shall allow for two-way voice communications between intercom stations and the master station. Calls may be initiated and canceled from either the intercom station or the master station.

a. Intercom Stations: Call button, cancel button, illuminated call indicator, speaker-microphone. installed in a 1- or 2-gang outlet box.

b. Master Station: Desk-mounted, incoming line volume control, talk-listen bar, reset button, speaker-microphone controlled by talk-listen bar, hand-set which overrides talk-listen bar, individual switches for each intercom station, all-call switch to simultaneously activate all intercom stations.

c. Equipment Cabinet: Hinged and lockable cover, recessed- or surface-mounted as indicated, manufacturer's standard finish, built-in power supply.

d. Cable: As required by system manufacturer.

e. Intercom System: The intercom system shall consist of intercom stations, a master station, conduit, and cable.

2. The Instructions to Bidders (AIA Document A701-87) states in Section 3.2:

3.2.1 The Bidder shall carefully study and compare the Bidding Documents with each other,...and shall at once report to the Architect errors, inconsistencies or ambiguities discovered.

3.2.2 Bidders and Sub-bidders requiring clarification or interpretation of the Bidding Documents shall make a written request which shall reach the Architect at least seven days prior to the date for receipt of Bids...

DISCUSSION

CLAIMANT'S POSITION¹

¹ While not suggested by Carolina's Request for Resolution, Carolina's argument at the CPOC hearing and the case law cited, e.g., *Robert E. Lee & Co. v. Commission of Public Works*, 149 S.E.2d 59 (1966), suggests Carolina was also making its claim on the grounds that the specifications were defective. In other words, a claim for breach of the implied warranty of plans and specifications. Such claims are well recognized in South Carolina law, e.g., *Hill v. Polar Pantries*, 64 S.E.2d 885 (SC 1951), *Robert E. Lee & Co. v. Commission of Public Works*, 149 S.E.2d 59 (1966), and *APAC Carolina, Inc. v. Town of Allendale*, 41 F.3d 157 (4th Cir. 1994). However the claim is applicable to the case before the CPOC. Carolina was provided with limited specifications that simply identified certain required performance features or system components. Carolina was not provided with detailed design specifications. "[A] case for defective [performance] specifications could exist only if performance had proven impossible, either actually or from a standpoint of commercial impracticability (i.e., commercial senselessness)." *Intercontinental Mfg. Co. v. United States*. 4 Cl. Ct. 591, 595 (1984). Carolina has not argued and the facts do not suggest that the specifications required Carolina to provide something that could not be provided, i.e., that the specifications were defective. Accordingly,

Carolina maintains that the specifications for the ICS prepared by the Project Architect/Engineer, Hayes, Seay, Mattern & Mattern (HSMM) and issued by the AGO were ambiguous; that this ambiguity was latent; and that the system ultimately required by the AGO was significantly more expensive than bid by Carolina. Carolina asserts that the bidding documents on their face requested an “intercom system”, whereas the AGO actually wanted and required Carolina to provide a more expensive “nurse call” system.

Carolina, after several rejected shop drawing submittals, requested HSMM to identify an acceptable product for the remote speaker unit (Exhibit 1, page 26). HSMM’s response, routed through Hood, is shown on Exhibit 1, page 27. Carolina contends that this response constituted a constructive change in the contract requirements, substituting a “nurse call” system for the as-bid “intercom” system.

RESPONDENT’S POSITION

The AGO maintains that the ICS specifications as issued were not ambiguous, that Carolina had adequate opportunity to review the specifications and seek clarification of any perceived ambiguity and did not do so. Further, the AGO argues that the specification was a performance specification, listing the required features and capabilities, without characterizing the finished product as “intercom” or “nurse call”. The AGO rejects Carolina’s characterization of HSMM’s response to Carolina’s request for assistance as a change to the specification requirements. In testimony, the AGO stated that they imposed no special standards, such as UL, on the ICS and were willing to accept any commercial product, provided the system possessed the requested features. The AGO submitted Exhibit 2 of the record.

CPOC FINDINGS

The issues raised by this controversy are ones of contract interpretation. The AGO entered into two contracts—one with HSMM for architectural and engineering services, and one with Hood for construction services. The AGO is fully responsible to Hood for the work of HSMM. Hood is fully responsible to the AGO for its work and the work of Hood’s subcontractors. None of the parties dispute their respective responsibilities.

Carolina’s claim is properly analyzed as a breach-of-contract claim. *Beacon Construction Company of Massachusetts v. United States*, 161 Ct. Cl. 1, 314 F.2d 501 (1963) (characterizing a claim for increased costs

The question then before the CPOC is simple. Does the AGO owe Hood any money for the work performed by Carolina on Hood's behalf? To determine the answer to that question, the CPOC must first determine whether the ICS requirements were in fact ambiguous; second, to determine whether the ambiguity was patent; and only if the ambiguity was not patent, to determine whether Carolina's interpretation of the Bidding Documents is reasonable.² If Carolina's interpretations were deemed reasonable, then the rule of *contra proferentum* would operate in Carolina's favor and Hood/Carolina would receive damages.³

A specification is ambiguous if it is capable of more than one reasonable interpretation. *Protest of Andersen Consulting*, Case No. 1993-18. The issue of ambiguity turns on the clarity of the Technical Specifications that are a part of Bidding Documents, all of which were prepared by HSMM on behalf of the AGO. HSMM is an experienced firm, well-versed in design and also in the State's policy for public construction in South Carolina. In short, that policy is to permit any appropriately licensed contractor to bid its projects. Because bidders' level of knowledge and experience is unknown, drawing and specification requirements must be clear and concise, and must clearly indicate the specific features or work to be provided. A designer can not assume that the contractor will include features not specifically called for and can not leave essential items to be defined during the shop drawing or construction process. In preparing its documents, a designer is expected to ensure that sections, details and dimensions are provided in sufficient quantity, clarity and detail to enable the bidder to understand what is expected, to make takeoffs of material types and quantities, and, once contracted, to prepare shop drawings and execute the construction. A designer is responsible to ensure that plans, sections, details and dimensions are

resulting from ambiguous specifications as a claim for breach of contract).

² This approach to contract interpretation is well established in Federal law. See *Jowett, Inc. v. United States*, 234 F.3d 1365 (Fed. Cir. 2000), and *Newson v. United States*, 676 F.2d 647 (Cl. Ct. 1982). See generally, John Cibinic, Jr. and Ralph C. Nash, Jr., *Administration of Government Contracts* 218 (3d ed. 1995). This approach is equally applicable to public bidding at the state level, e.g., *D'Annunzio Brothers, Inc. v. New Jersey Transit Corp.*, 586 A.2d 301, 304 (N.J. Super. Ct. App. Div. 1991). Consistent with this approach, the Panel has repeatedly held that vendors cannot complain if they fail to seek clarification of patent ambiguities prior to bidding. *Protest of Ruscon Construction Co., for Triad Mechanical Contractors*, Case No. 1994-10 ("If Triad found this specification ambiguous...Triad should have sought written clarification of the specification."), *Protest of Andersen Consulting*, Case No. 1993-18 ("The panel finds that Andersen did not take the proper steps necessary to clarify questions it had about the RFP and Amendment #001, and therefor cannot now claim an ambiguity."), and *Protest of Practorcare, Inc.*, Case No. 1988-17 ("The panel finds that, if a reasonable question existed in Practorcare's mind, it was incumbent on it to ask questions as is provided in the Request for Proposals at paragraph 1.1.5.").

³ While not referred to by its Latin name, the rule of *contra proferentum* is well established in South Carolina law. *Chan v. Thompson*, 302 S.C. 285, 395 S.E. 2d 731 (Ct. App. 1990)

coordinated one with the other and between disciplines. Technical Specification 16700, quoted in relevant part above, represents HSMM's requirements for the ICS. Also as noted above, the AGO stated that they imposed no special standards, such as UL, on the ICS and were willing to accept any commercial product, provided the system possessed the requested features.⁴

Is the specification prepared by HSMM subject to two reasonable interpretations? Carolina's arguments on this issue rest on the CPOC's determination of whether the phrase "intercom system" is a term of art with a technical meaning beyond the common. According to Carolina, the phrase "intercom system" is a term of art that references a specific type of device that *de facto* includes certain functionalities and excludes others. Carolina argues that such "intercom systems" do not include one of the functions or components required by the Technical Specifications—namely, the visual indicator. The CPOC concludes otherwise, based primarily on Carolina's own evidence. Exhibit 1 of the record, at page 61, provides a definition of the word "intercom":

Corruption of intercommunication. A device used to provide oral communication between two or more locations.

Further, Carolina provided excerpts from various UL standards related to ICS components and systems. While "nurse call" systems are the subject of a specific UL standard, there were no UL standards presented that are specific for "intercom" systems, which are combined with other electronic devices in the UL standards submitted by Carolina. In these standards the term "intercom" is not used, but rather the much broader phrase "intercommunicating devices and systems". Beyond the basic requirement that such a system "...provide oral communication between two or more locations", the CPOC does not find that the term "intercom system" can be reasonably interpreted to include or exclude any particular feature or functionality. Indeed, other evidence presented by Carolina (see Exhibit 1, pages 65-66) describes the increasing complexity of nurse call systems. The CPOC sees no logic in a position that one form of ICS ("nurse call") is capable of technological growth into a multi-functional communications system

⁴ While not determinative to the CPOC's decision, the AGO's position is supported by Hood, which stated in an April 4, 2001 letter to Carolina: "After review and discussions, it is Hood Construction Company's opinion that the corrected shop drawings properly reflect the specifications and the system should be installed at no additional cost to the owner. The intercom vs. nurse call debate is a matter of semantics. The owner, architect, and engineer have received the system that they originally requested; no more and no less."

while retaining its original name, but another, with a even less restrictive common name (“intercom”), is constrained to a limited, invariant set of functions.

On this finding alone, the claim by Carolina is rejected.

However, the CPOC also believes that to the extent any ambiguity might be found, the ambiguity is patent and Carolina therefore had an obligation to seek clarification. Technical Specification 16700, section 2.4, consists of one general paragraph of description followed by several subparagraphs listing functions or attributes of the desired system.

Carolina submitted Exhibit 1 of the record and presented the testimony of Mr. James Kitson, local sales representative for Simplex. Mr. Kitson testified that he had over 30 years of experience in the field of communications and signaling systems and was familiar with the features of suppliers “around the world” in his words. Mr. Kitson stated that his company’s bid to Carolina was based on a standard “intercom” system, not a “nurse call” system, and that in so doing, he relied on the characterization of the system as titled in Specification 16700. Mr. Kitson, in response to questioning, stated that he had read and understood the requirements of the specification and understood that all the functions listed in the specification were required. Mr. Kitson stated that he had not raised any concerns regarding the requirements of the specification either to Carolina or to HSMM.⁵ Mr. Kitson further stated his belief that “...they don’t make an intercom system in the whole world that provides a visual indicator.”

Mr. Kitson claims, and the CPOC has no reason of doubt, extensive experience in the field of ICS systems and equipment. By Mr. Kitson’s own testimony, he read and understood the requirements and chose not to question them. The CPOC believes that Mr. Kitson recognized the alleged ambiguity prior to bidding. The CPOC believes that the requirements of the Specifications were clearly stated and that Simplex and Carolina, had a duty to inquire and seek clarification of any perceived ambiguity, discrepancy or conflict.⁶ They did not do so, and on this element, the CPOC also finds for the AGO.

⁵ Simplex argued that they did not have time to submit written questions [on its own or through Carolina] before the deadline set in the bidding documents. Simplex apparently relies on a plans room service that takes some time to microfilm bidding documents before making them available to interested parties for review. Such a business practice is undertaken solely at the risk of the firm and does not relieve a contractor, subcontractor or supplier of its obligations in either bid preparation or contract execution.

⁶ See Panel cases cited in footnote above.

DECISION

It is the decision of the Chief Procurement Officer for Construction that Carolina Electrical Company of Columbia, Inc. has failed to meet its burden of proof by the greater weight or preponderance of the evidence that the Office of the Adjutant General's Technical Specification for the interior communications system for the McEntire Medical Clinic & Dining Hall Construction project are ambiguous. The Technical Specification required specific functionalities, Carolina Electrical Company provided those functionalities and no more. The claim is hereby denied.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "Michael M. Thomas". The signature is written in a cursive style with a horizontal line underneath it.

Michael M. Thomas
Chief Procurement Officer
for Construction

January 11, 2002
Date

STATEMENT OF THE RIGHT TO APPEAL

The South Carolina Procurement Code, under Section 11-35-4230, subsection 6, states:

A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review shall be directed to the appropriate chief procurement officer who shall forward the request to the Panel or to the Procurement Review Panel and shall be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.